

DEPARTMENT OF THE INTERIOR**Office of the Secretary****43 CFR Part 11**

RIN 1090-AA22

Natural Resource Damage Assessments**AGENCY:** Department of the Interior.**ACTION:** Final rule.

SUMMARY: This final rule amends the regulations for assessing natural resource damages resulting from a discharge of oil into navigable waters under the Clean Water Act or a release of a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act. The Department of the Interior has previously developed two types of natural resource damage assessment regulations: standard procedures for simplified assessments requiring minimal field observation (the type A rule); and site-specific procedures for detailed assessments in individual cases (the type B rule).

This final rule revises the type B rule to comply with all but one aspect of a court order. This rule establishes a procedure for calculating natural resource damages based on the costs of restoring, rehabilitating, replacing, and/or acquiring the equivalent of injured resources. This rule also allows for the assessment of all use values of injured resources that are lost to the public pending completion of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. The Department will soon issue a new proposed rule to address assessment of lost nonuse values of injured resources.

EFFECTIVE DATE: The effective date of the final rule is April 25, 1994.

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I. Background**A. Statutory Provisions**

The Clean Water Act, as amended (33 U.S.C. 1251 et seq.) (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601 et seq.) (CERCLA) authorize natural resource trustees to recover compensatory damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil into navigable waters or a release of a hazardous substance. CWA sec. 311(f); CERCLA sec. 107. Federal and State officials may be designated to serve as natural resource trustees under CERCLA and CWA. CERCLA also recognizes the authority of Indian tribes to commence actions as natural resource trustees.

Damages may be recovered for those natural resource injuries and losses that are not fully remedied by response actions. All sums recovered in compensation for natural resource injuries must be used to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources. Trustee officials may also recover the reasonable costs of assessing natural resource damages and any prejudgment interest.

CERCLA requires the promulgation of two types of regulations for the assessment of natural resource damages resulting either from a discharge of oil under CWA or from a release of a hazardous substance under CERCLA. CERCLA sec. 301(c). The type A regulations provide standard procedures for simplified assessments requiring minimal field observation. The type B regulations provide site-specific procedures for detailed assessments. Both regulations identify the best

available procedures for determining natural resource damages. Assessments performed by Federal and State trustee officials in accordance with these regulations receive a rebuttable presumption in court. CERCLA sec. 107(f)(2)(C). The promulgation of these regulations was delegated to the Department of the Interior (the Department). E.O. 12316, as amended by E.O. 12580.

The Oil Pollution Act (33 U.S.C. 2701 et seq.) (OPA) was signed into law on August 18, 1990. Among other things, OPA amended the natural resource damage provisions of CWA. OPA authorized the National Oceanic and Atmospheric Administration (NOAA) to develop new natural resource damage assessment regulations for discharges of oil into navigable waters. The Department is coordinating its rulemakings with NOAA to ensure, to the maximum extent possible, that consistent processes are established for assessing natural resource damages under CERCLA and OPA. OPA provides that until NOAA develops its regulations, the Department's regulations may be used to assess natural resource damages under OPA. OPA sec. 6001(b). NOAA published a proposed natural resource damage assessment rule on January 7, 1994. 59 FR 1062.

B. Regulatory History

The Department has issued various final rules for the assessment of natural resource damages: 51 FR 27674 (Aug. 1, 1986); 52 FR 9042 (March 20, 1987); 53 FR 5166 (Feb. 22, 1988); and 53 FR 9769 (March 25, 1988). These rulemakings are all codified at 43 CFR part 11.

The natural resource damage assessment regulations provide an administrative process for conducting assessments as well as technical methods for the actual identification of injuries and calculation of damages. Under the regulations, both type A and type B, assessments consist of four major phases.

The first phase of an assessment conducted under the regulations involves the activities that precede the actual assessment. For example, upon detecting or receiving notification of a discharge or release, trustee officials perform a preassessment screen to ascertain whether further assessment actions are warranted.

The second phase involves the preparation of an Assessment Plan. The Assessment Plan, which is subject to public review and comment, assists the involvement of potentially responsible parties (PRPs), other trustee officials, the general public, and any other interested

parties. The Assessment Plan also ensures that assessments are performed at a reasonable cost.

In the third phase, trustee officials conduct the work described in the Assessment Plan. The work involves three steps: Injury Determination; Quantification; and Damage Determination. In Injury Determination, trustee officials determine whether any natural resources have been injured. If trustee officials determine that resources have been injured, they proceed to Quantification, in which they quantify the resulting reduction in services provided by the resources. Finally, in Damage Determination, trustee officials calculate the monetary compensation to be sought as damages for the natural resource injuries.

In a type A assessment, trustee officials perform Injury Determination, Quantification, and Damage Determination through the use of standardized procedures involving minimal field work. The Department has adopted a phased approach to developing type A procedures for different environments. Only one type A rule has been developed to date. The existing type A rule provides for the use of a computer model to assess damages from small releases or discharges in coastal or marine environments. For other releases or discharges, trustee officials conduct a type B assessment, in which Injury Determination, Quantification, and Damage Determination are performed through the use of a range of alternative scientific and economic methodologies.

The fourth phase of every natural resource damage assessment, whether the type A or type B rule is followed, consists of post-assessment activities such as: Preparation of a Report of Assessment; establishment of an account for damage assessment awards; and development of a Restoration Plan for use of the awards.

C. Judicial Review

A party may petition the Court of Appeals for the District of Columbia Circuit to review any regulation issued under CERCLA. CERCLA sec. 113(a). A number of parties filed such petitions for review of the natural resource damage assessment regulations. The type A rule was challenged in *State of Colorado v. United States Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989) (*Colorado v. Interior*). The type B rule was challenged in *State of Ohio v. United States Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (*Ohio v. Interior*).

The court in *Ohio v. Interior* upheld various challenged aspects of the type B

rule but did remand three issues. The court ordered the Department to revise the rule to reflect the statutory preference for using restoration costs as the measure of natural resource damages. The court used the term "restoration costs" to encompass the cost of restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured natural resources. The court also ordered the Department to revise the rule to allow for the recovery of all reliably calculated lost values of injured natural resources, including both lost use values and lost nonuse values, with no specific hierarchy of methodologies required of trustee officials in estimating those values. Use values are derived through activities such as hiking or fishing. Nonuse values are not dependent on use of the resource. Nonuse values include existence value, which is the value of knowing that a resource exists, and bequest value, which is the value of knowing that a resource will be available for future generations. Finally, the court asked the Department to clarify whether the natural resource damage assessment regulations apply to natural resources that are not actually owned by the government.

D. Implementation of the Court Order

The Department published an advance notice of proposed rulemaking on September 22, 1989, to announce its intent to revise the type B rule to comply with *Ohio v. Interior*, 54 FR 39016. The Department issued a proposed rule on April 29, 1991, with comments requested by June 28, 1991. 56 FR 19752. On July 2, 1991, the Department extended the comment period to July 16, 1991. 56 FR 30367. On July 22, 1993, the Department reopened the comment period to allow consideration of additional comments, including newly developed information on the contingent valuation methodology (CV), the only method currently available for the express purpose of estimating nonuse values. 58 FR 39328. The comment period was originally reopened until September 7, 1993, and then extended until September 22, 1993. 58 FR 45877 (Aug. 31, 1993).

After reviewing the comments received in response to the July 22, 1993, Federal Register notice, the Department has decided to issue a final rule addressing all aspects of the *Ohio v. Interior* remand other than the assessment of lost nonuse values. The Department is considering revising the type B rule to include certain standards to improve the reliability of CV when used to calculate lost nonuse values. In

order to ensure that interested parties have an adequate opportunity for review and comment, the Department will soon publish the standards in a notice of proposed rulemaking. Pending completion of that rulemaking, the Department is temporarily leaving unchanged the remanded language of the original type B rule concerning assessment of lost nonuse values.

E. Other Rulemakings

CERCLA mandates biennial review and revision, as appropriate, of the natural resource damage assessment regulations. The Department plans to publish an advance notice of proposed rulemaking to begin the biennial update of the type B rule in July 1994. All aspects of the administrative process and the type B rule will be subject to review during that update. During the biennial review, the Department will consider ways of ensuring the greatest possible consistency between its damage assessment regulations and the damage assessment regulations being developed by NOAA.

Further, the Department plans to publish a proposed rule to revise the type A procedure for coastal and marine environments in compliance with *Colorado v. Interior* in November 1994. The Department is also developing an additional type A procedure for assessing damages in the Great Lakes. Like the type A procedure for coastal and marine environments, the type A procedure for the Great Lakes will incorporate a computer model. The Department expects to publish a proposed rule for the type A procedure for the Great Lakes in August 1994.

II. Overview of This Final Rule

A. Measure of Damages

The type B rule as originally published on August 1, 1986, provided that damages consisted of the lesser of the cost of restoring the injured resources or the diminution in the value of the injured resources without restoration. In *Ohio v. Interior*, the court ordered the Department to revise the rule to reflect the statutory preference for using restoration costs as the measure of natural resource damages. CERCLA provides that sums recovered in natural resource damage actions may be used to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources. The court used the simple term "restoration" costs as shorthand for the cost of performing any of these actions. 880 F.2d at 441. In many cases, trustee officials will likely use damage awards to fund some combination of these actions, rather

than only one. Therefore, the final rule allows trustee officials to recover the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources in all cases.

The court recognized the Department's authority to establish

* * * some class of cases where other considerations—i.e. infeasibility of restoration or grossly disproportionate cost to use value—warrant a [measure of damages other than the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources]. *Id.* at 459.

However, the Department believes that trustee officials will always perform some, albeit occasionally minor, form of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. Even in situations where natural recovery is the preferred action, trustee officials will nonetheless incur some costs, such as the expense of restricting public access or taking other actions to ensure that natural recovery is not impeded. Therefore, the final rule does not include any exceptions to the basic measure of damages. Moreover, the rule also provides trustee officials with the discretion to add to the basic measure of damages the value of the resource services lost to the public from the date of the discharge or release until restoration, rehabilitation, replacement, and/or acquisition of equivalent resources has been completed.

B. Restoration and Compensation Determination Plan

To assist trustee officials in developing claims under the new measure of damages, the rule provides for the development of a Restoration and Compensation Determination Plan. The Restoration and Compensation Determination Plan replaces the Restoration Methodology Plan discussed in the original version of the rule. The Restoration and Compensation Determination Plan is designed to focus the scope of Damage Determination. The Restoration and Compensation Determination Plan is part of the overall Assessment Plan and, thus, subject to public review and comment.

1. Selection of a Restoration, Rehabilitation, Replacement, and/or Acquisition Alternative

Since damages are based on the costs of restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured resources, trustee officials need a mechanism for projecting these costs. The rule includes a procedure for selecting a restoration, rehabilitation, replacement, and/or acquisition

alternative that can be used in this projection.

Under the rule, trustee officials first identify and consider a reasonable number of possible alternatives for restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured resources. Trustee officials also estimate those services that are likely to be lost to the public pending completion of each alternative under consideration. Trustee officials then select one of the possible alternatives. The rule lists factors that trustee officials must consider during the selection. The relative weight of these factors is left to the discretion of the trustee officials. Trustee officials document their decisions in the Restoration and Compensation Determination Plan.

2. Calculation of the Costs of Restoration, Rehabilitation, Replacement, and/or Acquisition of Equivalent Resources

Once the trustee officials select a restoration, rehabilitation, replacement, and/or acquisition alternative, they must choose the methods they intend to use to estimate the costs of implementing that alternative. To do this, trustee officials select among the specific cost estimating methodologies provided in the rule. The rule provides a number of criteria to guide the selection of cost estimating methodologies, including a requirement that the chosen methodologies are reliable for the particular incident and type of damage being measured. Trustee officials include the rationale for their selection in the Restoration and Compensation Determination Plan.

3. Calculation of Compensable Value

Under this rule, the costs of restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured resources are the basic measure of damages; however, these costs are only one component of the damages that trustee officials may assess. Trustee officials also have the discretion to assess the value of the services that the public lost from the date of the release or discharge until completion of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. The final rule uses the term "compensable value" to encompass all of the lost public economic values, including lost use values and lost nonuse values such as existence and bequest values. The Restoration and Compensation Determination Plan includes a description of the valuation methodologies trustee officials intend to use when estimating compensable value during Damage Determination.

a. Use values. The original type B rule provided a ranked list of valuation methodologies that could be used to calculate lost use values. If the market for the injured resource was "reasonably competitive," then the diminution of the market price attributable to the discharge or release was used to estimate damages. If a market-price methodology was not available, then the trustee officials were required to use appraisal methodologies. Only when neither market-price nor appraisal methodologies were appropriate for the resources being assessed did the original version of the rule allow trustee officials to use non-market-based methodologies.

The court ruled that the hierarchy of valuation methodologies incorrectly established a strong presumption in favor of market-price and appraisal methodologies. The proposed rule continued to rank valuation methodologies according to reliability but allowed trustee officials to use any of the methodologies whenever they wanted, notwithstanding the ranking. In light of potential confusion over the practical effect of the ranking in the absence of any restrictions on trustee officials' selections, the Department has eliminated the ranking from the final rule. The final rule leaves trustee officials free to choose any of the specified valuation methodologies. The rule provides a number of criteria to guide the selection of valuation methodologies, including a requirement that the chosen methodologies are reliable for the particular incident and type of damage being measured. Trustee officials include the rationale for their selection in the Restoration and Compensation Determination Plan.

b. Nonuse values. Sections 11.83(b)(2) and 11.83(d)(5)(ii) of the original version of the type B rule provided that lost nonuse values could only be assessed if trustee officials could not determine any lost use values. In the August 1, 1986, preamble to the original type B rule, the Department provided the following explanation for this restriction:

Ordinarily, option and existence values would be added to use values. However, section 301(c) of CERCLA mentions only use values. Therefore, the primary emphasis in this section is on the estimation of use values. 51 FR 27719.

Ohio v. Interior held that the Department had "erroneously construed the statute," stating:

[S]ection 301(c)(2) requires Interior to "take into consideration factors including, but not limited to" * * * use value." 42 U.S.C. § 9651(c)(2) (emphasis added). The statute's command is expressly not limited to use value; if anything, the language implies

that LOI is to include in its regulations other factors in addition to use value. 880 F.2d at 464.

The court went on to say that the Department—

• • • is entitled to rank methodologies according to its view of their reliability, but it cannot base its complete exclusion of option and existence values on an incorrect reading of the statute. *Id.*

The court instructed the Department to consider a rule that would permit trustee officials to include all reliably calculated lost values in their damage assessments. *Id.*

CV is currently the only method available for the express purpose of estimating nonuse values. CV can also be used to calculate use values. Under the original type B rule, CV was listed as a non-market-based methodology for calculating either lost use values or lost nonuse values. *Ohio v. Interior* held that the Department's decision to include CV as a best available procedure was not improper. *Id.* at 478. However, the court did not require the Department to allow unlimited use of CV. Moreover, the court did not address the difference between use of CV to calculate lost use values and use of CV to calculate lost nonuse values.

The Department received numerous comments on the use of CV. These comments focused on use of CV to estimate lost nonuse values rather than lost use values. In the April 29, 1991, notice of proposed rulemaking, the Department stated that "[w]hen CVM is used to quantify use values alone, it is judged to be just as reliable as the other nonmarket valuation methodologies." 56 FR 19762. Commenters did not dispute this assertion and have not provided any information to the contrary, even though the Department specifically solicited "reviews of CVM that address its reliability for measuring use values" in the July 22, 1993, Federal Register notice. 58 FR 39329. Thus, this final rule allows trustee officials to use CV to assess lost use values subject only to the restrictions applicable to any of the listed methodologies for assessing lost use values. However, during the upcoming biennial review of the type B rule, the Department will reconsider whether additional standards for the use of CV to estimate lost use values are appropriate.

Nonuse values, unlike use values, are not linked to behavior and, thus, are more difficult to validate externally than use values. Therefore, the Department will soon be issuing a proposed set of standards to improve the reliability of CV when used to estimate lost nonuse values. This final rule rennumbers

§§ 11.83(b)(2) and 11.83(d)(5)(ii) of the original rule, which restrict the assessment of lost nonuse values to cases where lost use values cannot be determined, as new §§ 11.83(c)(1)(iii) and 11.83(c)(2)(vii)(B), respectively. However, pending completion of the rulemaking concerning assessment of lost nonuse values, the Department is temporarily leaving unchanged the language of renumbered §§ 11.83(b)(2) and 11.83(d)(5)(ii), which was remanded by *Ohio v. Interior*.

C. Resources Covered by the Natural Resource Damage Assessment Regulations

The final issue remanded by *Ohio v. Interior* concerns the scope of the resources covered by the rule. The rule as originally published incorporated the statutory definition of "natural resources." This definition encompasses any resource—

Belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States * * *, any State or local government, any foreign government, or any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe. CERCLA sec. 101(16).

The court in *Ohio v. Interior* noted that, although CERCLA does not authorize recovery of damages for injuries to purely private resources, the statutory definition of "natural resources" is clearly not limited to resources literally owned by a government. 880 F.2d at 460. Similarly, in its oral argument in *Ohio v. Interior*, the Department recognized that applicability of CERCLA's natural resource damage provisions does not hinge solely on ownership. *Id.* at 461. However, the August 1, 1986, preamble to the final type B rule stated that "section 101(16) of CERCLA clearly indicates that privately owned natural resources are not to be included in natural resource damage assessments." 54 FR 27696. Therefore, the court asked the Department to clarify whether the natural resource damage assessment regulations may be used to assess damages for injuries to any resources that are not owned by the government.

The Department never intended to suggest that the applicability of the regulations hinges solely on ownership of a resource by a government entity. The rule is available for assessments of all natural resources covered by CERCLA, which under the plain language of the statute includes more than just resources owned by the government. Section 11.14(z), which was not affected by this rulemaking, incorporates the statutory definition of

"natural resource." The rule does not interpret this statutory definition. This final rule does, however, add a requirement that trustee officials prepare statements explaining the bases for their assertions of trusteeship. This statement must be included both in the Notice of Intent to Perform an Assessment, which is sent to PRPs, and in the Assessment Plan, which is subject to public review and comment.

D. Other Significant Issues

This final rule addresses two additional issues related to the court order:

- (1) Development of a preliminary estimate of damages; and
- (2) The date of promulgation of the natural resource damage assessment regulations.

1. Preliminary Estimate of Damages

Under § 11.35 of the rule as originally published, the determination of the appropriate measure of damages was made in the Economic Methodology Determination. In the Economic Methodology Determination, trustee officials were required to estimate both the costs of restoring the injured resources and the diminution in the value of the injured resources without restoration. The smaller value served as the measure of damages. The Economic Methodology Determination was then used to help trustee officials develop an Assessment Plan.

Under this final rule, damages always include the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. Therefore, the Department has eliminated the Economic Methodology Determination. However, the Economic Methodology Determination served a function that is still relevant under the revised rule. CERCLA provides that trustee officials may recover the costs of performing an assessment, but only if those costs are reasonable. Under the definition of "reasonable cost" in § 11.14(ee), which was not affected by this rulemaking, the anticipated cost of the assessment must be expected to be less than the anticipated damage amount. Under the original rule, the damage estimates developed during the Economic Methodology Determination helped trustee officials design their Assessment Plans so that this standard was met. In order to continue assisting trustee officials in performing assessments at reasonable costs in the absence of the Economic Methodology Determination, this final rule requires trustee officials to prepare a preliminary estimate of damages before they begin the development of an Assessment Plan.